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No. 82-696

In the Supreme Court of the United States

OCTOBER TERM, 1982

A. S. HORNER, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's failure to request the National Labor Relations Board to review the regional director's determination of an appropriate bargaining unit prior to the election constituted a waiver of further objection to the unit determination and barred court review of the merits of that issue in unfair labor practice proceedings following the election.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is not officially reported. The decision and order of the National Labor Relations Board (Pet. App. A13-A24) are reported at 246 N.L.R.B. 393. The Regional Director's Decision and Direction of Election and his Supplemental Decision on Objections to Conduct Affecting the Results of the Election and Certification of Representative (S.A. 1a-6a, 7a-13a) are unpublished.[1]

JURISDICTION

The amended judgment of the court of appeals was entered on July 15, 1982 (Pet. App. A1-A11) and a petition for rehearing was denied on September 7, 1982

[1] These decisions are appended hereto as a supplemental appendix ("S.A.").

(Pet. App. A12). The petition for a writ of certiorari was filed on October 20, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATIONS INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, and of the National Labor Relations Board's Rules and Regulations, 29 C.F.R. Part 102, are set out at Pet. App. A25-A40.

STATEMENT

1. Petitioner is engaged in highway and construction work throughout the State of New Mexico. The New Mexico District Council of Carpenters, AFL-CIO ("the Union") petitioned the National Labor Relations Board for a representation election among all the construction workers at one particular project, excluding only the heavy equipment operators already represented by another union in a state-wide unit (Pet. App. A2).

After an evidentiary hearing on the petition, the Board's regional director concluded that "no useful purpose would be served" by conducting an election limited to employees in the proposed single-project unit, since work on the project had been completed (S.A. 3a). Instead, he directed an election in a multi-craft, statewide unit,[2] finding that the record evidence established a community of interests among petitioner's unrepresented employees (*id.* at 3a-4a). In particular, he found that the 13 employees at the single project in issue were classified similarly to some 47 workers at petitioner's other projects; that petitioner had contracted to perform four other construction projects in the state

[2] At the hearing, the Union expressed its willingness to proceed to an election in an alternative unit—namely a state-wide unit of the petitioner's unrepresented construction employees (S.A. 3a).

and anticipated bidding on additional projects; that its policy was to transfer employees to other projects when work on one project was completed; and that the union sought a state-wide, multi-craft unit and no other labor organization sought to represent employees on any other basis (Pet. App. A2, A15; S.A. 3a-4a).[3] Petitioner did not request the Board to review the regional director's findings concerning the appropriate unit (Pet. App. A4, A15).

The Union won the ensuing election, with twenty-seven votes for the Union, nine against, and one challenged ballot. Petitioner filed timely objections to the conduct of the election, alleging, inter alia, that the regional director had directed an election in a unit that was inappropriate for purposes of collective bargaining. The regional director noted petitioner's failure to seek Board review of the unit determination prior to the election, as permitted by the Board rules and regulations, and concluded that this failure precluded petitioner from raising that issue as a post-election objection

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[3] The regional director rejected petitioner's claim that the designation of a multi-craft unit was contrary to Board precedent, noting that, while separate craft units are appropriate, the Board has also found overall units of construction workers to be appropriate, and that there was no rule of law requiring the Board to prefer one unit over the other as the more appropriate grouping (S.A. 3a-4a).

(Pet. App. A3, A16; S.A. 12a).[4] The regional director therefore overruled petitioner's objection as to the unit and certified the Union as the employees' bargaining representative.[5] The Board denied petitioner's request for review of the regional director's certification of the Union on the ground that the request raised no substantial issues warranting review (Pet. App. A3, A16).

Petitioner refused to bargain with the Union, the Union filed charges, and an unfair labor practice complaint issued. Granting the General Counsel's motion for summary judgment, the Board held that petitioner had violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), and entered a bargaining order (Pet. App. A3, A17-A18). With respect to the unit issue, the Board stated (*id.* at A18):

> [Petitioner's] failure to contest the Regional Director's unit determination * * * through the request

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[4] Section 102.67(b) of the Board's Rules and Regulations (29 C.F.R.) provides in relevant part (emphasis in original):

> The decision of the regional director shall be final: *Provided, however,* That within ten days after service thereof any party may file eight copies of a request for review with the Board in Washington, D.C.

Section 102.67(f) (29 C.F.R.) provides:

> The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceedings, any issue which was, or could have been, raised in the representation proceeding.

[5] Petitioner's further objections to the election based on alleged union misconduct were also overruled by the regional director (Pet. App. A2-A3) and are not now in issue.

In addition, petitioner attempted to raise a question as to voter eligibility by post-election objection, alleging for the first time that the standard voter eligibility formula utilized by the regional director was not appropriate in this case. This objection was also overruled by the regional director (Pet. App. A2-A3), and the petition does not appear to raise any issue with respect to that ruling.

for review procedure constituted a waiver of its right to appeal that finding in a subsequent proceeding. The preelection review process was the appropriate forum for raising such matters, and by neglecting to utilize it [petitioner] is precluded from asserting t[hat] issue[] now before us.

2. The court of appeals enforced the Board's order (Pet. A1-A11). It concluded that "[petitioner's] failure to request review by the Board of the regional director's initial decision [regarding the appropriateness of the bargaining unit] constituted a waiver of [its] right to a hearing on the merits before the Board, and it also resulted in a waiver of [its] right to court review on these issues," since, under Section 10(e) of the Act, 29 U.S.C. 160(e), a court will generally "not review issues not presented to the Board" (Pet. App. A5).[6] In reaching this conclusion, the court first noted that "there is nothing offensive in the Board's regulation [29 C.F.R. 102.67(b)] establishing the finality of the regional director's decision" (Pet. App. A4, citing *Magnesium Casting Co.* v. *NLRB*, 401 U.S. 137 (1971)). The court further noted that the Board's policy of treating the failure of a party to seek review of a regional director's decision as a waiver of objections to matters decided therein is "consistent with [its] legitimate concern as expressed in *NLRB* v. *A.J. Tower Co.*, 329 U.S. 324, 330 (1946), that an 'election could be converted from a definitive resolution of preference into a protracted reso-

[6] Section 10(e) provides in relevant part: "No objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

lution of objections disregarded or suppressed against the contingency of an adverse result'" (Pet. App. A5).[7]

ARGUMENT

1. Petitioner contends (Pet. 9) that the court below, in upholding the regional director's unit determination "without considering whether the decision was supported by substantial evidence in the record before it," failed "to discharge its statutory obligation under § 10(e) [29 U.S.C. 160(e)] to review fact based on substantial evidence in the record * * *." The court below properly rejected this contention.

Although Section 10(e) of the Act empowers a court of appeals to set aside a Board order that is not supported by substantial evidence on the record as a whole, that section also provides that "[n]o objection that has not been urged before the Board, its member, agent, or agency shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." As this Court recently emphasized, the requirement of Section 10(e) is jurisdictional and prevents judicial consideration of objections that were not initially urged before the Board. *Woelke & Romero Framing, Inc.* v. *NLRB*, No. 80-1798 (May 24, 1982), slip op. 20-21. See also *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) ("Simple fairness to those who

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[7] The court rejected petitioner's claim that the regional director's failure to make specific findings of fact concerning the appropriateness of the multi-craft unit raised a due process issue. The court explained that, although it considered the regional director's findings regarding the unit determination to lack the necessary specificity for judicial review, a remand for further findings on the merits would be "an exercise in futility" given the determination that petitioner had waived its right to object to the multi-craft unit (Pet. App. A7-A8).

are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only erred but has erred against objection made at the time appropriate under its practice."). Thus, a failure to raise a contention before the Board in timely fashion precludes review by the court of appeals unless there are "extraordinary circumstances" that justify the failure.

The rules adopted by the Board, in furtherance of the congressional policy of permitting the Board to delegate to its regional director its power to make unit determination subject to discretionary Board review (see *Magnesium Casting Co.* v. *NLRB*, 401 U.S. 137 (1971)), expressly state that decisions of a regional director defining the scope and composition of the voting unit "shall be final" but that any party may file a "request for review with the Board" within 10 days (29 C.F.R. 102.67(b)). The rules further provide that failure to request review of a regional director's decision "shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding" (29 C.F.R. 102.67(f)). Thus, the rules put petitioner on notice that the Board would consider objections to the regional director's unit determination only if they were filed with it prior to the conduct of the election and within 10 days after the regional director's determination, and that a failure to do so within this time period would constitute a waiver of the right to contest that determination.[8] Petitioner

[8] Since the composition of the unit has a direct bearing on eligibility to vote in the election, the Board's rule requiring that objections to unit determinations be raised prior to the election, when it is most practical for the Board to make corrections if the regional director has erred, furthers the congressional policy favoring expeditious resolution of questions concerning rep-

concededly failed to request review of the regional director's unit determination in accordance with the Board's prescribed procedures and instead proceeded directly to the election. Accordingly, the court below correctly concluded that petitioner had waived its right to contest that determination before the Board. Furthermore, since under Section 10(e) presentation of the issue to the Board is a prerequisite for judicial review, the court of appeals properly concluded that judicial review was precluded as well (Pet. App. A5).[9]

There also is no merit to petitioner's contention (Pet. 6-8) that failure to request review of the regional director's unit determination should be excused because a grant of review by the Board was so unlikely as to make the request a futile gesture.[10] This Court rejected a similar argument in *United States* v. *L.A. Tucker Truck Lines, Inc.*, *supra*, 344 U.S. at 37 (footnote omitted):

> It is urged * * * that the [agency] had a predetermined policy on this subject which would have required it to overrule the objection if made. While this may well be true, the [agency] is obliged to

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resentation. See *NLRB* v. *A.J. Tower Co.*, *supra*, 329 U.S. at 330; *NLRB* v. *Rexall Chemical Co.*, 370 F.2d 363, 366 (1st Cir. 1967).

[9] Petitioner argues (Pet. 9) that, in order to obtain court review under Section 10(e), all that is required is that an issue be raised before an "agent" of the Board. However, although the regional director might be considered an "agent" of the Board for some purposes, to regard the director as such for purposes of Section 10(e) would defeat the objective of that provision—i.e., to ensure that the Board, which is charged with the ultimate responsibility for decision, is timely apprised of, and afforded an opportunity to review, those issues that continue to be challenged.

[10] Petitioner did not raise this contention before the court of appeals. See *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Lawn* v. *United States*, 355 U.S. 339, 362-363 n.16 (1958).

> deal with a large number of like cases. Repetitions of the objection in them might lead to a change in policy, or, if it did not, the [agency] would at least be put on notice of the accumulating risk of wholesale reversals being incurred by its persistence.

2. Petitioner's reliance (Pet. 10) on *NLRB* v. *Capital Bakers, Inc.*, 351 F.2d 45 (3d Cir. 1965), is misplaced. Although in that case the court found that an employer's failure to seek review of the regional director's unit determination prior to the election did not preclude it from raising objections to that determination in subsequent judicial proceedings, this Court's decision in *Magnesium Casting Co.* v. *NLRB*, 401 U.S. 137 (1971), undermined the continuing validity of that earlier decision. In *Magnesium Casting*, the Court cited with apparent approval the Board rules applicable here (see 401 U.S. at 138 & n.2). As previously shown (page 7, *supra*), those rules make the regional director's decision defining the scope and composition of the voting unit final, unless an appeal is taken to the Board prior to the election, and treat the failure to seek Board review as a waiver of further objection to such unit determination.

Nor is there merit to petitioner's contention (Pet. 11) that the decision below conflicts with *St. Elizabeth Community Hospital* v. *NLRB*, 626 F.2d 123 (9th Cir. 1980). There, the issue first raised in the post-election representation proceedings concerned the possible exemption of the hospital from the Act under the First Amendment. That issue called the Board's jurisdiction into question. In this case, by contrast, the issue that petitioner seeks to raise does not go to the Board's power to hear and decide the controversy, but only to whether the Board properly exercised authority that it admittedly possesses. While Section 10(e) may not foreclose judicial review of issues challenging the Board's jurisdiction (but see *St. Anthony Hospital Systems* v. *NLRB*, 655 F.2d 1028, 1030 (10th Cir. 1981)), it is clear

that it does foreclose review of other claims that were not raised at the appropriate time and in the appropriate forum.

The other cases to which petitioner points (Pet. 11-12) as evidence of a conflict in the circuits are also distinguishable. Neither *Consolidated Freightways* v. *NLRB*, 669 F.2d 790 (D.C. Cir 1981), nor *NLRB* v. *Blake Construction Co.*, 663 F.2d 272 (D.C. Cir. 1981), involved the complete omission of the review step present here. In those cases, exceptions were taken to the decision of the administrative law judge, and the critical inquiry was whether the objection made was adequate to put the Board on notice that the particular matter was still in issue.[11] Here, in contrast, it is undisputed that petitioner did not make timely objection to the regional director's decision and proceeded directly to election, objecting to the unit determination only after it lost that election.

Nor does *Procter & Gamble Manufacturing Co.* v. *NLRB*, 658 F.2d 986 (4th Cir. 1981), cert. denied, No. 81-107 (Oct. 4, 1982), conflict with the decision below. There, the Fourth Circuit permitted an issue to be raised on review despite the employer's failure to raise that issue before the Board by a motion for reconsideration. However, the Board had timely notice that the matter was being contested, for the General Counsel

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[11] In *Consolidated Freightways*, the court held that the nature of the objection was evident by the context in which it was raised. 669 F.2d at 794-795. Likewise, in *Blake Construction*, although the court noted that the exceptions were "no paragon of precision or detail," it concluded that the objections to the scope of the complaint, the substantiality of proof, and the administrative law judge's handling of the proceeding were "considerably more focused and quite different from the general *pro forma* objections found to be impermissibly vague" in cases such as *Marshall Field & Co.* v. *NLRB*, 318 U.S. 253 (1943), and, in conjunction with the supporting brief, were adequate to preserve a due process objection. 663 F.2d at 284.

had excepted to the administrative law judge's decision on the point, and the employer had "briefed and argued" the issue to the Board (658 F.2d at 988 n.23). Here, the Board had no notice at the proper time that the unit determination was in dispute.[12]

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[12] Petitioner's reliance on *NLRB* v. *Annapolis Emergency Hospital Association*, 561 F.2d 524 (4th Cir. 1977), is similarly misplaced. In that case, the court of appeals found that the hospital had sufficiently raised the issue in the representation proceeding, and that, in any event, "the Board's error was a purely legal one, so basic in its nature that § 10(e) has no application" (*id.* at 526). Specifically, the court held that the Board exceeded its statutory authority by certifying a bargaining agent on condition that it not bargain but delegate absolute bargaining authority to another entity (*id.* at 528). Here, petitioner did not object to the unit determination at all until the post-election stage, and, even assuming that the regional director erred in making the unit determination, any such error was not analogous to the "basic," "purely legal" error involved in *Annapolis Emergency Hospital Association*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1983

APPENDIX

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

A.S. HORNER, INC. EMPLOYER

and

NEW MEXICO DISTRICT COUNCIL OF CARPENTERS, AFL-CIO, PETITIONER

Case No. 28-RC-3517

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claim(s) to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All construction employees, including timekeepers, employed by the Employer in the State of New Mexico; excluding heavy equipment operators represented by another labor organization, job superintendents, general foremen, watchmen, guards and supervisors as defined in the Act.[1]

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[1] The Petitioner seeks a unit of all construction employees employed by the Employer at its irrigation construction project near Costilla, New Mexico, excluding heavy equipment operators, office clerical employees and all other employees, guards, watchmen and supervisors as defined in the Act. The parties appear to agree that the operators should be excluded from any unit found appropriate because they are presently represented by another labor organization as a part of a state-wide unit.

The Employer's position is that an election among its Costilla employees should not be conducted now because the project will be completed in the immediate future. In the alternative, the Employer asserts that it would be inappropriate to direct an election because the existing complement of employees is not representative, that a unit restricted to the particular project described in the petition would be inappropriate because of the Employer's policy and practice of transferring construction employees from one project to another, and, finally, that the inclusion in the unit of more than one craft would be improper.

The Employer is a construction contractor engaged in engineering and highway work. At the present, along with other projects discussed below, it has a project near Costilla, New Mexico, involving structural work and an irrigation canal relocation. The job commenced about the first part of March 1978, and is scheduled to be completed about Thanksgiving 1978. As of the date of the hearing, August 1, 1978, the job was scheduled to be shut down within a few weeks for a period of three weeks because of water in the canal. Thereafter, work will resume when the water is shut off, but a gradual reduction of employees at the Costilla project will commence about the last part of October 1978, and continue until the job is completed about Thanksgiving. The evidence that the job will be finished about Thanksgiving has not been controverted. The Employer does not have any work at Costilla other than this project and it does not contemplate any other work at the Costilla location in the foreseeable future. There are approximately 13 employees in the unit sought by the Petitioner and the Employer employs approximately 61 employees in the classifications the Petitioner seeks to represent at all its jobsites throughout New Mexico.

In view of the fact that there will be a temporary layoff at the Costilla job shortly, if it has not already occurred, which will last three weeks, and that the final layoff of employees at the Costilla project will commence in the latter part of October 1978, and continue gradually until the job is completed around Thanksgiving, no useful purpose would be served by conducting an election which is limited to the employees at the Employer's Costilla, New Mexico, jobsite. *M. B. Kahn Construction Co., Inc.*, 210 NLRB 1050; *Clark Construction Company, Inc.*, 129 NLRB 1348; *General Motors Corporation*, 88 NLRB 119; *Parsons Corporation*, 86 NLRB 74.

However, at the hearing, the Petitioner expressed its willingness to proceed to an election in a state-wide unit of the Employer's unrepresented construction employees. With respect thereto, the evidence discloses that the Employer presently has contracted to construct four other projects in New Mexico and anticipates bidding on other projects. The projects for which the Employer has presently secured contracts are located in the vicinity of Tucumcari, Mosquero, Las Vegas and Folsom, New Mexico. The project at Las Vegas is also nearing completion and, at the time of the hearing, it was anticipated that the Folsom project would not commence for approximately one month. Moreover, the record discloses that it is the Employer's policy to transfer employees to other projects, if available, when work on one project is completed. Including the 13 employees on the Costilla project whom the Petitioner seeks to represent, the Employer had approximately 60 similarly classified employees employed on its various projects in New Mexico at the time of the hearing.

Although the Employer contends that a unit limited to its Costilla employees is inappropriate because of their community of interest with other similarly classified employees in the State of New Mexico, it nevertheless asserts that the petition should be dismissed on the ground that the Petitioner is seeking to represent craft or functional groups which it does not ordinarily represent in the construction industry. The Employer further contends on the basis of *R. B. Butler, Inc.*, 160 NLRB 1595, and other similar cases, that the unit sought herein deviates from Board policy concerning the establishment of units in the construction industry. The Employer's reliance on such cases for the proposition that multi-craft units in the construction industry are not appropriate is misplaced. Although it is true that the Board has found separate craft or funtional groups to be appropriate units in the construction industry, the establishment of broader units is not precluded where, as here, there is evi-

dence of an existing community of interest among the employees in the various groups, the Petitioner seeks such a broader unit and no other labor organization seeks to represent the employees on any other basis. See, e.g., *Del-Mont Construction Company*, 150 NLRB 85. Likewise, there is no prohibition in the statute or Board policy against a labor organization representing craft groups other than those it traditionally represents. Accordingly, I find a unit of all construction employees employed by the Employer in the State of New Mexico to be appropriate herein.

The parties appear to agree and the record supports the conclusion that the job superintendents are supervisors within the meaning of the Act and I so find. Accordingly, I have excluded the job superintendents from the unit.

The unit placement of the general foremen and the timekeepers remain to be considered. At the hearing, evidence was developed to show that the general foremen were responsible for the disciplining of employees assigned to their crews, which, on occasion, include sub-foremen. In addition, the general foremen assign and direct the work of crew members. Accordingly, I find the general foremen to be supervisors within the meaning of the Act and, therefore, they shall be excluded from the appropriate unit.

With respect to the timekeepers, the record shows that ordinarily there is a single timekeeper at each project and that they are responsible for collecting and submitting all time and payroll information to the Employer's home office in Colorado. In addition, they maintain the Employer's cost coding system which, on occasion, requires that they visually inspect the functions being performed by the various craft or functional groups. The timekeeper also functions as parts chaser and, as such, is responsible for ordering and picking up parts for the project. Although the Petitioner would exclude the timekeepers on the ground that they are not engaged in construction work, the record shows that their work is performed primarily on the construction site and is directly related to the construction work. Moreover, the unit sought here is not limited by traditional craft lines and the fact that the timekeeper may not actually perform construction work is outweighed by evidence showing their function is in direct support of the work carried out by the construction employees. Accordingly, I shall include the timekeepers in the appropriate unit.

DIRECTION OF ELECTION[2]

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election dates and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by New Mexico District Council of Carpenters, AFL-CIO.

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[2] Inasmuch as the unit found appropriate herein is broader than that sought by the Petitioner, the election directed herein is contingent upon the submission of an adequate showing of interest in the broader unit by the Petitioner within 10 days of the date of issuance of this Decision and Direction of Election. In the event the Petitioner fails to submit such an adequate showing of interest for the unit found appropriate, or notifies the undersigned of its desire to withdraw its petition within the stated time period, the Direction of Election herein shall be vacated and the petition dismissed.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B.* v. *Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, 2 copies of an election eligibility list, containing the names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned/Officer-in-Charge, Subregion, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Albuquerque Resident Office, 5000 Marble Avenue, N.E., Albuquerque, New Mexico 87110 on or before August 30, 1978.

No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstnaces. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1717 Pennsylvania Avenue, NW., Washington, D.C. 20570. This request must be received by the Board in Washington by September 5, 1978.

/s/ _____

Regional Director, Region 28

Dated August 23, 1978
at Phoenix, Arizona

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
REGION 28

Case No. 28-RC-3517

A.S. HORNER, INC. EMPLOYER

v.

NEW MEXICO DISTRICT COUNCIL OF CARPENTERS,
AFL-CIO PETITIONER

SUPPLEMENTAL DECISION ON OBJECTIONS TO CONDUCT AFFECTING THE RESULTS OF THE ELECTION AND CERTIFICATION OF REPRESENTATIVE

NOV 16 1978

Pursuant to a Decision and Direction of Election issued by the undersigned Regional Director on August 23, 1978,[1] in the above-numbered case, an election by secret ballot was conducted under the direction and supervision of the undersigned on September 22, by an agent of the National Labor Relations Board among the employees in the unit found appropriate for collective bargaining.[2] The tally of ballots served on all parties at the conclusion of the balloting showed the following:

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[1] All dates herein refer to 1978, unless otherwise noted.

[2] All construction employees, including timekeepers, employed by the Employer in the State of New Mexico; excluding heavy equipment operators represented by another labor organization, job superintendents, general foremen, watchmen, guards and supervisors as defined in the Act.

Approximate number of eligible voters	41
Void ballots	1
Votes cast for Petitioner	27
Votes cast against participating labor organization	9
Valid votes counted	36
Challenged ballots	1
Valid votes counted plus challenged ballots	37

Objections to conduct affecting the results of the election were timely filed by the Employer on September 29, with copies being served on all parties.

Acting pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, the undersigned, after reasonable notice to all parties to present relevant evidence, has caused an investigation to be made of the objections. The parties were afforded an opportunity to submit evidence bearing on the issues. Having considered all the evidence submitted by the parties and otherwise disclosed by the investigation, the undersigned hereby issues the following Supplemental Decision.

THE OBJECTIONS

1. The Union unlawfully interfered with the election by misrepresenting and mischaracterizing National Labor Relations Board processes and procedures.
2. The Union interfered with the election by improperly extending a waiver of initiating fees to eligible voters.
3. The Unit in which the Regional Director directed an election was inappropriate for purposes of collective bargaining.
4. The Regional Director's Decision and Direction of Election failed to properly define voter eligibility resulting in the disenfranchisement of em-

ployees sharing a community of interest with those who were permitted to vote.

OBJECTION NO. 1:

The Employer has taken the position that in meetings on the night before the election and in a memorandum dated September 15 representatives of the Petitioner told employees that in the event the Petitioner won the election, employees would be represented by craft unions other than the Petitioner. The Employer contends that this misrepresentation of the consequences which would result from Board certification falls within the exceptions set forth in *Shopping Kart Food Market, Inc.*, 228 NLRB 1113, because it conflicts directly with the Act which provides that the certified bargaining representative will be the exclusive representative of all employees in the appropriate unit.

The Petitioner's position is that by its memorandum and by its statements in meetings prior to the election it intended only to convey to employees its intention to consult with other craft unions with regard to their respective members' wages and other terms or conditions of employment before entering into an agreement with the Employer. The Petitioner maintains that at no time did it tell employees that any union besides the Petitioner would negotiate for or represent employees. The Petitioner's memorandum is attached hereto as Appendix A. That portion of the memorandum which the Employer finds objectionable states:

> .... if the voting is favorable the District Council with the assistance of the other craft unions will do everything in their power to negotiate a favorable Agreement. I would like to add that the employees do have the power to reject or approve any settlement that the Unions might negotiate.

It appears from the investigation that final meetings were held by the Petitioner for employees both in

Costilla and Tucumcari, New Mexico, one week or two weeks before the election. Some employees understood from the representatives of the Petitioner at these meetings that some other craft unions had already been contacted and that if the Petitioner won the election, employees would have an opportunity to join the craft union of their choice at a reduced rate. These other craft unions would then take part in negotiations along with the Petitioner. Other employees understood that if the Petitioner won it would then attempt to secure an understanding with other craft unions which would allow employees to be members of those other craft unions. Still other employees understood that if the Petitioner was successful in the election, the Petitioner would represent the employees in the unit.

The investigation does not clearly establish with any precision exactly what employees were told in this regard by representatives of the Petitioner. The Petitioner's letter itself is ambiguous, apparently implying that while other unions may participate with the Petitioner in negotiations with the Employer, that this participation may be active or be limited merely to consultation.

However, even assuming that employees were told that other unions would take part in negotiations along with the Petitioner or that they would be able to join other craft unions, such statements are neither clearly misrepresentations of the consequences of Board certification nor the type of misrepresentation contemplated in the Board's exceptions in *Shopping Kart, supra*. On the other hand, it is clear that the Employer could not refuse to bargain with the Petitioner as the exclusive representative of its employees simply because it chose to include in its negotiating committee representatives from other craft unions.[3]

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[3] *General Electric Co.*, 173 NLRB 253, 254-256.

On the other hand, even a misrepresentation by the Petitioner to employees that its representation would not be exclusive but would permit actual representation by other unions, in the context this statement is alleged to have been made, would not come within the ambit of the Board's exceptions in *Shopping Kart, supra*. The investigation did not disclose evidence to establish that in making any such a statement, assuming it was made, the Petitioner invoked the Board's processes or otherwise claimed Board support for such a position. To assume such an implication would be no less contrived than to assume that the intended implication was that these things would only come to pass provided the Employer agreed.

I will, therefore, on the basis of the above and the investigation as a whole, overrule Employer's Objection No. 1 in its entirety.

OBJECTION NO. 2:

The investigation disclosed no evidence that a waiver of initiation fees was extended by the Petitioner in behalf of itself or other unions to employees who signed authorization cards or who became members of a union prior to the election. Rather, it is clear from the investigation that employees understood that if the Petitioner won the election, and, then, only after the election, employees would be permitted to join the Petitioner with a reduced initiation fee. No time deadline was indicated. No employees were told they would receive the reduced rate if they signed authorization cards before rather than after the election.

Therefore, I will overrule Employer's Objection No. 2 in its entirety.[4]

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[4] *N.L.R.B.* v. *Savair Manufacturing Co.*, 414 U.SA. 270.

OBJECTIONS NOS. 3 & 4:

The Employer objects to the undersigned's failure to direct an election in a unit defined along craft lines rather than in a unit encompassing all employees. It further objects to the undersigned having failed in the Decision and Direction of Election to utilize the Board's formula for election eligibility in the construction industry as set forth in *Daniel Construction Co., Inc.*, 167 NLRB 159, and thereby disenfranchising many employees.

I note that while both the appropriate unit and employee eligibility were discussed in the Decision and Direction of Election noted above, the Employer did not request review of that Decision within the time period provided for in the Board's Rules and Regulations. Neither did the Employer request an extension of the time period for filing a request for review.

I will, therefore, overrule Employer's Objections Nos. 3 and 4 in their entirety.

SUMMARY DECISION

Based on the foregoing and the entire investigation, I conclude that the Employer's objections are without merit and, accordingly, they are hereby overruled.

CERTIFICATION OF REPRESENTATIVE

Pursuant to authority vested in the undersigned by the National Labor Relations Board,

IT IS HEREBY CERTIFIED that a majority of the valid ballots have been cast for New Mexico District Council of Carpenters, AFL-CIO, and that, pursuant to Section 9(a) of the National Labor Relations Act, as amended, the said labor organization is the exclusive representative of all the employees in the unit set forth below, found to be appropriate for the purposes of collective bargaining with respect to rates of pay, wages,

hours of employment, or other conditions of employment.

UNIT:

All construction employees, including timekeepers, employed by the Employer in the State of New Mexico; excluding heavy equipment operators represented by another labor organization, job superintendents, general foremen, watchmen, guards and supervisors as defined in the Act.

/s/

MILO V. PRICE, REGIONAL DIRECTOR[5]
National Labor Relations Board
Region 28
3030 North Central Avenue
P.O. Box 33069
Phoenix, Arizona 85067

[5] Under the provisions of Section 102.69 and 102.67 of the Board's Rules and Regulations, a request for review of this Supplemental Decision may be filed with the Board in Washington, D.C. Pursuant to Section 102.69(g), affidavits and other documents which a party has submitted timely to the Regional Director in support of objections are not part of the record unless included in the Regional Director's Decision or appended to the request for review, or opposition thereto which a party submits to the Board. The request for review must be received by the Board in Washington by November 27, 1978.